Phon Nam v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-32-90
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
15 JUNE 1991

Criminal Procedure — Discretion exercised by trial judge — Object to be achieved — Balance to be maintained between interest of accused and duty of prosecution — Criminal Procedure Code (FMS Cap 6), s 425

In this case the appellant had been charged with trafficking in heroin. At the trial the chemist's reports were tendered in evidence but the police officer who served the reports on the appellant was not called. The learned trial judge acquitted the appellant without calling on him for his defence: see [1987] 2 MLJ 262. Subsequently on an appeal to the Supreme Court, the Supreme Court ordered that the case be remitted back to the High Court for continued hearing and directed the trial judge to invoke s 425 of the Criminal Procedure Code and to call the police officer to give evidence. At the continued hearing, the police officer gave evidence but counsel for the appellant submitted that the proper service of the relevant chemist's reports had still not been proven. The learned trial judge then allowed the prosecution to recall the police officer to give further evidence. Subsequently, he called on the appellant for his defence and after hearing the defence convicted the appellant and sentenced him to death. The appellant appealed.

Held, allowing the appeal:

(1) The exercise of discretion under s 425 of the Criminal Procedure Code must always be in the interest of justice. Because the exercise of discretion is judicial and not arbitrary, a balance must always be maintained between the interest of the accused and the duty of the prosecution to prove every ingredient of the offence at the end of the prosecution case.

(2) In this case the learned trial judge had gone beyond the object of the law and had not properly exercised his discretion under s 425 of the Criminal Procedure Code as required by law.

[Bahasa Malaysia summary

Di dalam kes ini perayu telah dituduh mengedar dadah heroin. Di perbicaraannya laporan-laporan pegawai kimia telah dikemukakan sebagai keterangan. Akan tetapi pegawai polis yang telah menyampaikan laporan-laporan itu kepada perayu tidak dipanggil sebagai saksi. Hakim yang arif yang membicarakan kes itu telah membebaskan perayu tanpa memanggil ia membela dirinya. Kemudiannya apabila rayuan dibuat ke Mahkamah Agung, mahkamah itu telah memerintahkan kes itu dihantar balik ke Mahkamah Tinggi supaya perbicaraan diteruskan dan telah mengarah hakim yang membicarakan kes itu menggunakan s 425 Kanun Acara Jenayah dan memanggil pegawai polis yang berkenaan untuk memberi keterangan. Di perbicaraan seterusnya, pegawai polis itu telah memberi keterangan, akan tetapi peguam bagi pihak perayu telah berhujah bahawa penyampaian sewajarnya laporan-laporan pegawai kimia itu masih belum dibuktikan. Hakim yang membicarakan kes itu telah membenarkan pihak pendakwa memanggil pegawai polis itu sekali lagi untuk memberi keterangan lanjutan. Kemudiannya, beliau telah meminta perayu membela dirinya dan selapas mendengar pembelaan itu, beliau telah mensabitkan kesalahan perayu dan menjatuhkan hukuman mati. Perayu telah membuat rayuan.

Diputuskan, melulushkan rayuan itu:

(1) Penggunaan budibicara di bawah s 425 Kanun Acara Jenayah hendaklah sentiasa untuk kepentingan keadilan. Oleh kerana penggunaan budibicara itu ialah budibicara kehakiman dan bukan budibicara sewenang-wenangnya, perseimbangan hendaklah diadakan antara kepentingan orang yang dituduh dan tugas pihak pendakwa membuktikan tiap-tiap unsur kesalahan itu di akhir kes bagi pihak pendakwa.

(2) Di dalam kes ini hakim yang arif yang membicarakan kes itu telah terkeluar dari objek undang-undang dan telah tidak menjalankan budibicaranya dengan wajar di bawah s 425 Kanun Acara Jenayah seperti dikehendaki oleh undang-undang.]

Cases referred to

1 *PP* v *Phon Nam* [1988] 3 MLJ 415 (refd)
2 *Teoh Hoe Chye* v *PP* [1987] 1 MLJ 220 (refd)
3 *Ramli bin Kechik* v *PP* [1986] 2 MLJ 33 (folld)
4 *PP* v *Lin Lian Chen* [1991] 1 MLJ 316 (folld)
5 *Reid* v *The Queen* [1980] AC 343 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 425

Appeal from: Criminal Trial No 5 of 1984 (High Court, Ipoh)

Karpal Singh for the appellant.
CT Wong (Deputy Public Prosecutor) for the respondent/ Public Prosecutor.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): On 17 September 1986, the appellant was charged in the High Court, Ipoh with trafficking in 128.8g of heroin under s 39B(1)(a) of the Dangerous Drugs Act 1952. On 1 October 1986, the learned trial judge acquitted the appellant without calling for his defence. The learned trial judge had ruled that it would not be proper for him to exercise his discretion under s 425 of the Criminal Procedure Code (FMS Cap 6) ('the Code') to call for the evidence of service of the chemist's reports through a police constable although there was no dispute as to the existence of the chemist's reports.

When the public prosecutor appealed against the acquittal this court ordered that the case be remitted back to the High Court for continued hearing and directed the trial judge to invoke s 425 of the Code and to call DPC Mohd Yunan bin Mohd Ali ('PW10') to testify as to the service of the two chemist's reports ('P25' and 'P26') on the appellant (see *PP* v *Phon Nam*[1]).

When the trial of the case was continued before the same trial judge, he allowed the prosecution to call the said PW10. After completing the evidence of PW10 the prosecution closed its case.

Counsel for the appellant then submitted that the prosecution had not made out a prima facie case, inter

alia, on the grounds that the proper service of the relevant chemist's reports, P25 and P26 (in particular the main chemist's report, P25), were not proven. For this contention he relied on the evidence of PW10 itself and what appeared on the two chemist's reports. It can be seen clearly that although the chemist's report P25 is dated 8 February 1985, the endorsement at the back of the report referred to a report dated 14 February 1984 and the said report dated 14 February 1984 was never produced. In his submission before us, counsel for the appellant also added that the signature acknowledging the service was not verified at all.

After hearing the reply by the learned deputy public prosecutor, the learned trial judge allowed the prosecution to recall PW10, purporting to exercise his discretion under s 425 of the Code but adjourned the trial to await the written judgment of this court with regard to the earlier appeal. When the trial resumed on 25 March 1990 the learned deputy public prosecutor (a different one from the earlier officer) submitted that the court should exercise its discretion under s 425 of the Code to enable the prosecution to recall PW10 as well as Insp Mohd Sakri ('PW1') to clarify the dates of the chemist's reports in question. The trial judge allowed the prosecution to recall PW10. However, in his evidence PW10 again repeatedly stated that he could not remember if copies of the chemist's reports, P25 and P26, were served on the appellant.

In his second submission of no case in the continued trial, learned counsel for the appellant emphasized that there was a vital link in the entire prosecution case which was missing and that was that the service of the chemist's reports had not been proved beyond reasonable doubt and referred to *Teoh Hoe Chye* v *PP*.[2] He also submitted that not only was the signature of the appellant not verified but the signature of DPC Mohd Yunan was not found on either endorsement.

However, the trial judge called for the defence and after hearing the defence, convicted the appellant and sentenced him to death.

After hearing submissions in the appeal we allowed the appeal, quashed the conviction and set aside sentence.

In our view, the sole issue here is the exercise of discretion under s 425 of the Code by the learned trial judge in this case. When the discretion under s 425 of the Code should be exercised has been amply explained by this court in the earlier judgment involving the same appellant as also explained in *Ramli bin Kechik* v *PP*.[3] The discretion is to be exercised depending on the facts of each case, the main consideration being the essentiality of the additional evidence for the purpose of arriving at a just decision of the case.

The real object of the exercise of discretion under s 425 of the Code is to enable the court to arrive at a just decision so that the failure to call for the additional evidence would not result in an erroneous acquittal or in an erroneous conviction. The exercise of the discretion is not an arbitrary decision to favour the prosecution or the defence. The discretion is never intended to make 'emergency repairs' to the prosecution case as correctly stated by Mohtar Abdullah J in *PP* v *Lin Lian Chen*.[4]

At the core of s 425 is the interest of justice and the exercise of the discretion must always be in the interest of justice. In our adversarial system it must not be forgotten, however, that the cardinal rule is that the prosecution must prove every ingredient of the offence at the close of the prosecution case. Because the exercise of discretion is judicial and not arbitrary, a balance must always be maintained between the interest of the accused and the duty of the prosecution.

In this case it is clearly seen that despite being given the opportunity for a second bite, the prosecution had failed to prove its case. What the trial judge did after the close of the prosecution case at the continued hearing was to give the prosecution a third bite. The balance referred to earlier was therefore not maintained which resulted in prejudice to the appellant. As stated by Lord Diplock in *Reid* v *The Queen*,[5] if the court were to give the prosecution a second chance to make good the evidential deficiencies in its case, why not also give a third chance and so on. His Lordship said to do so would amount to 'an error of principle'. Although his Lordship was dealing with the order of a new trial, the same principle would apply here.

It would appear to us that the learned trial judge went beyond the object of the law and therefore did not properly exercise his discretion under s 425 of the Code as required by law.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Prof Ahmad Ibrahim*